C OF A (CIV) 16 OF 91

IN THE LESOTHO COURT OF APPEAL

In the appeal of:

MPHALE SULA	APPELLANT
AND	
MATEBOHO TLALI	RESPONDENT

Held at Maseru

Coram:

Ackermann, J.A.
Steyn, J.A.
Kotzé, J.A.

JUDGMENT

Ackermann, J.A.

In the High Court the respondent (to whom I shall refer simply as "Tlali") applied by way of urgent motion proceedings and without notice for an order against the appellant (to whom I shall refer simply as "Sula") that he (Sula) place her (Tlali) in occupation of certain immovable property at Qoaling, Ha Besele in the Maseru district ("the Ha Besele property") upon Tlali vacating and making over to Sula another immovable property at Qoaling, Ha Letlatsa, in the Maseru district ("the Ha Letlatsa property") as well as other ancilliary relief. On the 18th

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September 1990 a rule *nisi* was issued against Sula with one paragraph thereof operating as an interim interdict with immediate effect.

On the 24th June 1991 a final order was granted. In the written judgment of Lehohla, J. of that date it is simply stated that

> "The application is granted with costs on party and party scale."

The order of Court issued under the assistant registrar's signature and date stamp of the 5th August 1991 reads as follows:

> "IT IS ORDERED THAT:
>
> 1. That the Deputy Sheriff of this Court be and is hereby directed to eject, forthwith, from the premises situate on a certain unnumbered site at Qoaling, Ha Besele, in the Maseru district, MPHALE SULA, the Respondent herein, and any other persons that may be in occupation of the said premises on the strength of any agreement with the Respondent and to put in occupation of the said premises 'MATEBOHO TLALI, the Applicant herein, upon the Applicant vacating and making over to the Respondent the premises she presently occupies situate on a certain

unnumbered site at Qoaling, Ha Letlatsa in the Maseru district, both properties which were the subject matter of these proceedings, as well as in Civil Case 102 of 1987 of the Matala Local Court and Civil Case 269 of the Matsieng Central Court between the parties herein.

2. The Chief or Headman of Qoaling, Ha Besele he and or the Sheriff of this Court are hereby directed to cause to be transferred into the Applicant's name all documents of title appertaining to the said immovable property situate on the said unnumbered site at Qoaling, Ha Besele, in the Maseru district.

3. That the Respondent pay the costs of this Application on an attorney and client scale.

4. That the Respondent be and is hereby interdicted from causing the Applicant to be evicted from her residence at Qoaling, Ha Letlatsa until the Respondent shall have

complied with the judgement of the Court in this matter."

It is against this order which the present appeal is brought. From the record it is not apparent why, judgment having been delivered on the 24th June 1991, the order of Court itself was only issued on the 5th August 1991. A court order should of course be issued immediately after a judgment has been given or the particular order granted. Save in matters where the prayer for relief is of the very simplest nature and where the order can follow ***verbatim*** the ***ipsissima verba*** of the prayer itself, it is inadvisable for a judicial officer in giving judgment to state merely that "the application is granted". It can create confusion when the order itself is to be formulated and issued. The prudent course is to indicate the precise terms of the order at the conclusion of the judgment. There appears to be a patent error in paragraph 3 of the order dated 5th August 1991 where it is stated that Respondent was awarded costs "on an attorney and client scale". It is true that in prayer 1(d) of the Notice of Motion and in paragraph 1(d) of the rule ***nisi*** reference is made to costs "on an attorney and client scale". In his judgment delivered on the 24th June 1991 Lehohla, J. refers specifically to this prayer for costs on an attorney-and-client scale. He gives reasons for declining to make an award of costs on such scale and in the judgment, as already indicated, expressly awards costs only on the "party and party scale". The Judge ***a quo*** was ***functus officio*** after delivering the judgment on the 24th June

1991 and no material amendment of the costs order could validly have taken place thereafter. It is common cause between the parties that the order issued incorrectly reflects the award of costs.

I turn to the merits of the present appeal.

The present proceedings were but one round in the legal skirmish between the parties concerning the Ha Besele and Ha Letlatsa properties.

It is common cause that the two parties, without being lawfully married to one another, had lived together as man and wife in the Maseru district for the period between 1966 and 1981. At the time they were both lawfully married to other spouses and both had children born of these marriages. Initially the parties lived together in a dwelling at Qoaling, Ha Besele, in the Maseru district. Although also situated in Ha Besele, this property is not the one to which the present dispute relates. In 1981 Tlali went to live on the Ha Letlatsa property, the relationship between the parties still continuing. During or about 1986 Sula asked Tlali to move to the Ha Besele property which is in issue in these proceedings. In her founding affidavit Tlali states that Sula "demanded" that she move to the Ha Besele property whereas Sula in his answering affidavit says that he merely "asked" her to move. Although there is a major dispute as to the material terms of the agreement governing Tlali's occupation of

the Ha Letlatsa property, and the terms of agreement which would govern her move to the Ha Besele property, the version given by Sula as to why Tlali was asked to move to the Ha Besele property was not challenged by Tlali. In this regard Sula deposed that since both he and Tlali had grown-up children from their respective marriages, this factor complicated their "concubinage" as the children did not approve of their relationship. For this reason it was thought prudent that they should live apart. This of course did not mean that their relationship would cease, but merely that it would be conducted more discreetly.

It is significant that, in her founding affidavit, Tlali very carefully avoids swearing to the terms of a firm agreement as to her rights of occupation or ownership in the properties in question. She deposes as follows:

> "During about 1986 Respondent demanded that I vacate my said residence and move to another house which he had erected on a different unnumbered site at Qoaling, Ha Besele. I refused to comply with this demand arguing that the house I was residing in was the result of a joint effort between Respondent and I, that I was accordingly a co-owner thereof and that, in any case, I had moved into it by agreement with Respondent, the idea being that it would, in due course, be transferred to me as my property. Respondent's argument was that the house we had agreed

with him would be my property was the one he was demanding that I move to." (Emphasis added)

Soon thereafter the relationship between the parties turned sour and in 1987 Sula instituted proceedings in the Matala Local Court (the "Local Court") for the ejectment of Tlali from the Ha Letlatsa property. The Local Court found in Sula's favour, holding as follows:

"Therefore, the plaintiff's claim is accepted. The Defendant should vacate this site at Mohlakeng, Qoaling as it belongs to the Plaintiff legally."

The Local Court (contrary to what is asserted in Tlali's affidavits) made no finding as to the existence or terms of any agreement relating to the Ha Besele property. Tlali then appealed successfully to the Matsieng Central Court. Sula in turn appealed to the Judicial Commissioner against the order of the Central Court and succeeded in this appeal. The judgment of the Judicial Commissioner delivered on the 13th July 1990 is brief:

"Appeal is upheld with costs."

The effect hereof was to restore the order of the Local Court evicting Tlali from the Ha Letlatsa property. There is likewise no finding by the Judicial Commissioner in regard to an agreement

concerning the Ha Besele property. Tlali's averment in her founding affidavit that

> "The Judicial Commissioner's reasons for upholding the Respondent's appeal were, in substance, that the trial Court's finding that Respondent and I had agreed that my house would be the one erected by Respondent at Qoaling, Ha Besele to which I would remove, could not be faulted"

is unfounded. The local court made no such finding and the Judicial Commissioner gave no such reason. The local court was not obliged to make such a finding, which would have been irrelevant to the proceedings. The only issue before the local court was whether Tlali could establish a valid right of occupation in respect of the Ha Letlatsa property. Tlali did not appeal against the judgment of the Judicial Commissioner and accordingly there is an unassailable order of the Local Court evicting her from the Ha Letlatsa property.

Faced with this position a tortuous attempt has been made on Tlali's behalf to construct a claim to the Ha Besele property based on Sula's evidence, attitude and submissions in the aforementioned legal proceedings. It is an awkward position. Having been disbelieved by the Local Court on her claim to the Ha Letlatsa property and having a binding judgment against her on this issue, it was not permissible for Tlali in the present

proceedings to rely on any contractual claim to the Ha Letlatsa property against Sula.

It is difficult to determine what Tlali's cause of action is in the present proceedings. She could hardly go on oath to assert a contract in respect of the Ha Besele property, because this would flatly contradict her evidence in the Local Court. It is against this background that the following statement in her founding affidavit must be examined:

> "After the judgment of the Judicial Commissioner I decided, on reflection, not to contest it, but to abide the same and go along with Respondent's version of our agreement."

To "go along" with "Respondent's version" of an agreement falls short of alleging, let alone proving, a contract with Sula conferring rights on her in respect of the Ha Besele property. What Tlali's affidavit in fact demonstrates is that there was no meeting of the parties minds regarding the identity of the property to which Tlali would acquire rights and hence no binding contract between the parties in respect of any property.

Tlali also refers in her founding papers to certain correspondence which passed between the attorneys representing the parties. In a letter from Sula's attorney to Tlali's attorney dated 30th July 1990 it is stated that

"Our client has agreed to give possession of the property to your client in terms of his undertaking throughout these legal proceedings."

This letter was however "withdrawn" by a subsequent letter fr Sula's attorney dated 7th August, 1990, on the basis that t earlier letter was written "because of a misunderstanding." Su says that the letter of the 30th July 1990 "did not reflect a proper instructions." This was not denied by Tlali in h replying affidavit. In any event Tlali nowhere avers that th exchange of correspondence constituted a contract which found a cause of action for the relief she was seeking.

In my view Tlali did not, even on her own papers, establi any cause of action in contract entitling her to the reli sought.

Even if it could be established that a contract had be concluded on the basis of the offer made by Sula it is n possible to establish on the present papers that this would ha entitled Tlali to any relief.

Sula, in his answering affidavit, is quite adamant that a arrangement with Tlali

"entirely rested on the continued state of concubinage

between me and Applicant, which has however now ceased to exist"

Tlali does not crisply deny this averment in her answering affidavit. Instead she merely argues that it is contradicted by evidence given by Sula at the Local Court hearing. When examined on Tlali's behalf at those proceedings Sula gave the following answers

"13. We agreed then, because we both had children, yours and mine.

14. The reason I developed the site for you being that, once the children had grown up, we would separate and you were to go and live at the site I was looking for, for you."

It is by no means clear whether the phrase "we would separate" refers to the parties separating at some stage from their respective spouses or from one another, in the sense of not continuing to live under the same roof. On either construction the context seems to indicate that whatever was arranged or agreed upon seemed to be premised on the continuation of the relationship or "concubinage" as Sula refers to it. There is nothing in the evidence before the Local Court or in the subsequent proceedings which indicates with any certainty that

such undertaking as might have been given by Sula, was given quite regardless of whether the "concubinage" continued or not. I can find nothing in these proceedings which is destructive of Sula's statement, quoted above, that any arrangement was dependent upon the continued state of concubinage. On Sula's version there would be no obligation on him to put Tlali into possession of any property because the concubinage had come to an end.

On this issue there is therefore a direct conflict of fact. In my view this conflict is of such a nature that it cannot be resolved on the affidavits without hearing oral evidence. (See Plascon-Evans Paint v Van Riebeeck Paints 1984(3)SA 623(A) at 634E - 635C).

It was strenuously argued that, as a result of the relationship between the parties some form of universal partnership had come into existence between them, alternatively that Tlali had acquired rights as co-owner in one or more of the properties owned by Sula or, at the very least, that Tlali is entitled to some form of compensation for improvements made by her to Sula's property. There may, or may not, be truth in these submissions. It is unnecessary and undesirable to pronounce on any of them for the simple reason that Tlali made no attempt, in her application, to make out any case based on any of these possible causes of action.

The conclusion I have come to is that Tlali failed to make out any case for relief in her application and that the court *a quo* erred in granting judgment in her favour. In the result the appeal must succeed.

The following order is made:

1. The appeal is allowed with costs.

2. The order of the court *a quo* is altered to read:

"The *rule nisi* is discharged and the application is dismissed with costs."

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L.W.H. ACKERMANN
JUDGE OF APPEAL

I agree .....
J.H. STEYN
JUDGE OF APPEAL

I agree .....
G.P.C. KOTZÉ
JUDGE OF APPEAL

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Delivered at Maseru on the ..... day of January, 1991.